

1 UNITED STATES DISTRICT COURT,
2 FOR THE DISTRICT OF MONTANA
3 MISSOULA DIVISION

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5 JORE CORPORATION,

6 Plaintiff,

7 v.

8 DRILLCRAFT TOOLS CORPORATION,

9 Defendant.
10 -----

11 CAUSE NO. CV-12-126-M-DWM

12 PARTIAL TRANSCRIPT OF PROCEEDINGS

13 August 21, 2012

14 BEFORE: MAGISTRATE KEITH STRONG
15

16 APPEARANCES:

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1 Wednesday, August 21, 2012

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3 (WHEREUPON, the following is a partial
4 transcript of the proceedings had in open court:)

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6
7 THE COURT: All right. The record will
8 show that counsel and the parties are present.
9 And that I am going to read into the record slowly
10 my proposed -- or my findings of fact, conclusions
11 of law and recommendation.

12 I need not remind everybody, but I will
13 before I do this, that A, regardless of what I
14 rule, Judge Molloy's order still remains in effect
15 and controls at least until its expiration. And
16 that this is a preliminary hearing, and none of
17 these conclusions are either law of the case or
18 res judicata. They are a way of dealing with the
19 pending motion only.

20 All right. So my findings and
21 recommendation are as follows: Excuse me as I
22 make a note or two. This court has jurisdiction
23 at least under the diversity statute. The matter
24 comes before me by reference from Judge Molloy by
25 virtue of more than one order, and particularly

1 subject to his order of July 24, 2012, issuing a
2 temporary restraining order. That temporary
3 restraining order is in full force and effect as
4 extended -- as reflected by the record.

5 The court is required to apply the Winter
6 factors, Winter v. NRDC, 555 U.S. 7 and 20 (2008),
7 to determine whether a temporary restraining order
8 should apply.

9 The facts: The parties are Jore and
10 Drillcraft, which I -- who are specifically and
11 formally identified in the pleadings, and I will
12 refer to them as Jore and Drillcraft throughout.
13 The parties have during the times relevant to this
14 matter had a business relationship of supplier and
15 buyer. That relationship is reflected, in part at
16 least, by a document that is in evidence. It is
17 attached to the complaint. It's admitted. It is
18 also separately referred to as Exhibit D2 and was
19 admitted into evidence and referred to by all
20 parties.

21 DTC was a supplier. Drillcraft was a
22 supplier for Jore. And at some times, at least,
23 the terms and conditions of Exhibit D2 applied to
24 the relationship between Jore and Drillcraft.

25 The dispute here arises around a product

1 envisioned by and created by Jore for a customer
2 of Jore, Makita, as a 70-piece I will call it
3 drill bit set. Jore came up with the idea. Jore
4 sent requests for quote to several different
5 vendors eventually, and the design -- eventual
6 design was a joint venture of collaboration, but
7 the idea was Jore's. Then for the Makita project,
8 DTC manufactured and supplied the product, which
9 Jore then provided to Makita.

10 The communications between the parties
11 during the creation of this product are subject
12 both to some legends on documents calling them
13 confidential and proprietary and also subject to
14 clause 22 of the Defendant's Exhibit 2, the Jore
15 terms and conditions. And they were proprietary.
16 They were marked at least proprietary and
17 confidential during these conversations. However,
18 they were disclosed, the record reflects, to other
19 potential vendors, not just DTC, in requests for
20 quotation.

21 Makita has since learned that another
22 vendor -- or that a product similar to the product
23 that Jore created for it, and similar to the
24 product that Makita is marketing and is an
25 important marketing device for it with Home Depot,

1 Makita has learned that other similar products
2 have been marketed specifically under the Kobalt
3 brand. And that that has, the record reflects,
4 already occurred.

5 Makita has made demand upon Jore and
6 threatened suit essentially alleging, as I
7 understand the record, that Jore made this product
8 specifically for them and does not have the right
9 to market it to others.

10 DTC has a contract -- has accepted and is
11 prepared to perform a contract to deliver numerous
12 sets of drill bits of different sizes to Lowe's.
13 That contract is in the final stages of being
14 performed. DTC intends to perform them. The
15 contract contains sets of drills and drill bits --
16 excuse me -- not drills, but drill bits and other
17 bits that are, except for items like color and
18 labeling, essentially identical to the set made
19 for Makita.

20 The record does not reflect that Jore
21 ever had the opportunity to bid on that contract
22 with Lowe's. Does not reflect that it lost the
23 contract because it was underbid. And but Jore
24 seeks to restrain DTC's performing that contract,
25 and that is the subject of the temporary

1 restraining order.

2 The information that was exchanged during
3 the creation, design and original marketing of the
4 Makita product was no longer confidential by the
5 time DTC accepted the contract with Lowe's because
6 when those drill bits are placed on the market,
7 there is no secret that any competitor can examine
8 and reengineer them if they choose to do so.

9 There is nothing that a competitor can't learn and
10 use, and that is not subject to imitation. And
11 there is essentially no larger limit on imitation.

12 So the information which was confidential
13 and proprietary during the design of the contract
14 ceases to be confidential and proprietary upon the
15 release of the product. Once the product, such as
16 the Makita 70-piece drill bit, is released on the
17 market, any potential competitor has a competitive
18 advantage because they can copy it without the
19 development costs, and that is simply a fact of
20 marketing this kind of product. So the contract
21 was not, as a factual matter, breached by DTC's
22 use or release of confidential information.

23 The contract, however, contains a clause
24 relating to tooling. The record reflects that DTC
25 has a business relationship, which it refers to as

1 a partnership, with a business in China, which
2 performs the manufacturing for DTC. DTC is
3 essentially a middleman contracting for the
4 delivery of these products to its own customers.
5 The tooling that is necessary to make this product
6 largely, the record reflects, the case of the
7 product and the product and the case inserts,
8 which make the case more valuable to customers,
9 the tooling to manufacture that product was
10 created by the DTC's China partner, maintained by
11 them at their place of business, used by them in
12 the creation of this particular Makita product and
13 is retained to them to this day and was used by
14 them to manufacture the sum of the products
15 necessary to fulfill the Lowe's order.

16 The existence of that tooling gave DTC
17 and its China manufacturing partner a competitive
18 edge because the -- it already exists and would
19 not have to have been developed as an additional
20 overhead cost to make this product. The testimony
21 by Jore was uncontroverted that DTC has used that
22 tooling in order to produce this product.

23 The contract between the parties contains
24 a clause relating to a clause in paragraph 22
25 relating to tooling. That clause is a part of

1 Jore's standard provisions apparently, as the
2 record reflects, for its vendors, and says the
3 tooling identified as being subject to this
4 clause, and obtained directly or indirectly from
5 the other in connection with this contract, then
6 shall be kept confidential and not be used to
7 compete is a paraphrase of the clause.

8 There is no evidence that Jore ever
9 specifically identified, that is by pointing out
10 and by communicating to either the DTC or to its
11 China customer that the tooling necessary to build
12 the Makita 70-piece set was specifically
13 identified and therefore subject to this clause.
14 The facts indicate that it clearly was, however,
15 obtained by the China factory, at least
16 indirectly, as a necessary step in performing the
17 contract. There was no evidence that Jore
18 provided DTC or its China partner specifically
19 with any materials, with any equipment.

20 Mr. Cheff testified that he assumed that
21 as a business practice, a person who had received
22 a contract, act as a vendor, would not use any
23 tooling again except with respect to the person,
24 in this case Jore, that ordered it. However, the
25 contract clause stands as I have read it. The

1 tooling was obtained only in the sense that Jore
2 had the idea necessary to create the product the
3 tooling was required to perform.

4 DTC obtained a competitive price
5 advantage from the tooling and is currently
6 underselling -- at least is currently quoting a
7 price that is one significantly lower than Jore
8 believes it could match, the record reflects, in
9 part because of the ability to use the tooling and
10 in part because of its ability -- its position to
11 not have to develop the product.

12 Jore drafted this contract, distributes
13 and requires it as a regular course of business.
14 The evidence about the creation of the product was
15 essentially undisputed that all of the parts
16 developed were developed in connection with a
17 customer's demand and all parts were developed for
18 a specific function. There was no evidence
19 introduced of a non-functional trade dress for
20 this product for either the Makita or the Kobalt.

21 So as a conclusion from those findings of
22 fact, I make the following conclusions of law:
23 The parties had a valid and binding contract
24 entered into in March of 2010. As a matter of
25 Montana law, that contract is strictly --

1 especially in this commercial setting, strictly
2 interpreted against the drafter. In this case any
3 ambiguity would be interpreted against Jore.

4 There is at least an ambiguity whether materials
5 remained confidential once they are completely
6 disclosed on the market and at least an ambiguity
7 as to whether or not specific tooling needs to be
8 identified under the contract. Those ambiguities
9 must be resolved under Montana law, which applies
10 by the contract's terms, against the drafter,
11 Jore.

12 The contract was not breached by use of
13 confidential information because it was -- the
14 information in question was already disclosed by
15 the time of the bid. The contract was not
16 breached by the use of DTC's tooling or the
17 tooling of China's DTC partner because that was
18 not specifically identified under the contract, as
19 the terms of Jore's agreement would specify.

20 There was no trade dress violation
21 because the -- because the evidence did not meet
22 the non-functionality test that the Ninth Circuit
23 has adopted in Leatherman Tool Group v. Cooper
24 Industries, Inc., 199 F.3d 1009, 1013, Ninth
25 Circuit, 1999.

1 Therefore, applying the four factors of
2 Winter v. NRDC, I find that the likelihood of
3 success on the merits, while I can't eliminate the
4 possibility, does not reach that likelihood
5 necessary to sustain a temporary restraining
6 order.

7 The irrevocable harm standard in this
8 case appears to me to be not met because it
9 appears to me that the contract with DTC is
10 already let and ready to be performed, that Jore
11 is not going to get that contract regardless.
12 Jore is facing significant harm, but it appears
13 that monetary damages would be sufficient. And
14 the evidence was uncontroverted that Drillcraft
15 would be destroyed if the injunction continues.
16 So that also deals with the balance of equities.

17 In this case I do not see a public
18 interest factor myself. This is a contract and
19 intellectual property dispute among private
20 parties. Therefore, I recommend that Judge
21 Molloy, based on those findings and conclusions,
22 dissolve the temporary restraining order and the
23 case proceed to judgment on the merits for
24 monetary remedy.

25 All right. That's what I've got. So,

1 Betty, how do we go about getting the people a
2 copy? We should file a copy of my -- the last
3 part of my findings and recommendation that I just
4 did since the break.

5 There being nothing further for our
6 agenda today, we are adjourned.

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8 (WHEREUPON, court was held in recess.)
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C E R T I F I C A T E

STATE OF MONTANA)
 : ss.
County of Cascade)

I, Betty S. Robinson, do hereby certify
that:

I am a duly appointed, qualified and
acting Official Court Reporter of the United
States District Court for the District of Montana;
that I reported all of the foregoing proceedings
had in the above-entitled action, and the
foregoing transcript contains a full, true and
correct transcript of the said proceedings.

IN WITNESS WHEREOF, I have hereunto set my
hand on this ____ day of _____, 2012.

Betty S. Robinson, RMR
Official Court Reporter